

THE HONORABLE JUDGE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DENNIS HENNEMAN,

Plaintiff,

-vs-

KITSAP COUNTY, a Municipal Corporation,

Defendant.

NO. 3:17-cv-05066-RBL

KITSAP COUNTY'S MOTION FOR
SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
April 27, 2018

KITSAP COUNTY, by and through its undersigned attorneys, and pursuant to Fed.R.Civ.P. 56, submits this motion for summary dismissal of all claims asserted by Plaintiff.

I. ISSUES

Based on the claims contained in Plaintiff's Complaint, the issues for consideration in this motion are as follows:

A. Claims under Washington's Law Against Discrimination.

1. Disparate Treatment. Did Kitsap County terminate Dennis Henneman from employment because of his age and disability in violation of Washington's Law Against Discrimination (WLAD), RCW 49.60.180? Complaint, Dkt. 1-3, pp. 3-4, ¶¶3.2-3.7.

2. Retaliation. Did Kitsap County retaliate against Dennis Henneman in violation of

1 WLAD for having a disability, for requesting a reasonable accommodation, and because of his
2 age? Complaint, Dkt. 1-3, p.4, ¶¶3.8-3.13.

3 3. Failure to Accommodate a Disability. Did Kitsap County take adverse action in
4 violation of WLAD when it failed to accommodate Dennis Henneman's mental health limitation
5 by failing to engage in the interactive process with him and by terminating him for having a
6 disability? Complaint, Dkt. 1-3, p.4, ¶¶3.14-3.16.

7
8 B. Claims under the Americans with Disabilities Act.

9 1. Did Kitsap County take adverse action against Dennis Henneman in violation of
10 the Americans with Disabilities Act (ADA) when it failed to accommodate his disability by failing
11 to engage in the interactive process with him and terminating him for having a disability?
12 Complaint, Dkt. 1-3, p. 5, ¶¶3.17-3.19.

13
14 II. FACTS

15 Dennis Henneman began working as a Kitsap County correctional officer in 1990. In 2011
16 he applied for the specialty position of background investigator, and after a competitive
17 recruitment, was selected to conduct background checks of candidates for employment with the
18 Sheriff's office. Declaration of Ned Newlin, Exhibit A.¹

19 On October 3, 2014, Henneman² approached Corrections Sergeant Craig Dick asking what
20 Henneman should do when he is stressed out. Henneman informed Sergeant Dick that a new
21 database program for background investigations was not working for him and asked if he could go
22 back to doing them the old way on paper. Declaration of Roxane Payne, Exhibit A. Dick
23 recommended Henneman speak with the program managers or Chief of Corrections. Id.
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28 ¹ Training records establish Officer Henneman received regular training in conducting background investigations, in suicide prevention, and in mental health, crisis intervention, and conflict management.

² We will generally refer to individuals by their last name only. No disrespect is intended.

1 On October 6, 2014, Henneman approached Officer Shawn Buzzell, a coworker and vice-
2 president of the union, about Henneman's specialty position as a background investigator,
3 complaining that it was taking a toll on him and his family. Declaration of Roxane Payne, Exhibit
4 B. Henneman then stated to Officer Buzzell "you would think after Andra, they would take the
5 hints." When Buzzell asked whether Henneman was feeling like Andra did, Henneman answered
6 "yes, I am." As he said this, Henneman was emotional and crying. Henneman's statement was
7 particularly concerning to Buzzell for the reason that Corrections Officer Andra Griffo had
8 committed suicide only three months before. Out of a genuine concern for Henneman's mental
9 state, Buzzell reported Henneman's comments to Lieutenant Roxane Payne. Id.; Payne
10 Declaration, Exhibit C.

11
12 Shortly after Buzzell reported Henneman's comments to Lieutenant Payne, she spoke with
13 Henneman who confirmed the statements he had made to Buzzell. Payne Declaration, Exhibit C.
14 Henneman became emotional again and tearful, but denied being suicidal. Lieutenant Payne asked
15 Henneman if he would speak with the on-duty mental health professional. Henneman agreed. Id.

16
17 Mental health worker John Perona evaluated Henneman shortly thereafter. After his
18 meeting with Henneman, Perona informed Lieutenant Payne that he did not have any concerns
19 that Henneman was suicidal, but Henneman should be removed from his specialty position as a
20 background investigator and consult with his personal physician. Id. After receiving this
21 information from Perona, Lieutenant Payne informed Henneman that he would be removed of the
22 background investigator duties as he requested, and sent home so he could follow up with his
23 physician and return to work when his doctor cleared him to do so. Id. After departing the jail,
24 Henneman went to the Human Resources department and obtained a Family Medical Leave
25 Request Form. Declaration of Nancy Buonanno Grennan, Exhibit A.
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1 After the County received certification from his health care provider that he qualified for
2 FMLA leave, Henneman was approved for leave for the period of October 6, 2014 through
3 December 24, 2014. Declaration of Nancy Buonanno Grennan, Exhibit B. FMLA leave was later
4 extended to December 29, 2014. Grennan Declaration, Exhibit C. Human Resources personnel
5 notified Henneman that although his FMLA would expire on December 29, if he needed leave
6 beyond that date he could provide additional medical documentation as “he may qualify for certain
7 ADA accommodations at that time.” Id. On December 24, Human Resources received a request
8 to extend Henneman’s leave of absence to January 2, 2015. Grennan Declaration, Exhibit D.
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10
11 On December 29, the County received a request from Henneman seeking light duty for
12 thirty days upon his return to work. Henneman’s request was granted, and effective January 2,
13 2015, Henneman was assigned to work in the control room, swing shift, with same days off as he
14 had had on graveyard shift. Declaration of Genie Elton, Exhibit A.

15
16 Henneman worked without incident between January 2 and January 13. On January 9,
17 County records show Henneman sent an email from his work address to his home address with a
18 draft letter of resignation. Declaration of Jacquelyn Aufderheide, Exhibit A. On or about January
19 12, Henneman had a conversation with Officer Taylor that he was contemplating resigning his
20 employment. Elton Declaration, Exhibit C.

21
22 Just before his shift on January 13, and at his request, Henneman met with Chief Newlin
23 and Lieutenant Genie Elton where he announced his “retirement.” Elton Declaration, Exhibit B.
24 He stated he intended to separate service on January 27, and wanted to give advance notice so he
25 could separate on “good terms.” Id. According to Lieutenant’s Elton’s notes, Henneman was not
26 wavering or undecided in any fashion, he was resolute. Henneman said he was to meet with Sheriff
27 Gary Simpson at 4:00 p.m. later day and would give his formal written notice to the Sheriff at that
28

1 time. Henneman said he did not intend to work in the law enforcement arena any longer.
2 Henneman became tearful and spoke of his plan to “find the tough guy” he “had lost.” He said
3 that somewhere along his career he had changed and the “tough guy” he once knew was lost and
4 he wanted to regain that strength. He said he had thought long and hard about the decision to
5 retire. Id.

7 After the meeting with Newlin and Elton, Henneman requested he be issued a retirement
8 card. Newlin Declaration, Exhibit B.

9 Later that afternoon, Henneman met with Sheriff Simpson and delivered his notice of
10 resignation. Aufderheide Declaration, Exhibit B. His resignation letter reads:

12 This is my Notice of Resignation (retirement) with my final day of work
13 being 27, January 2015. At this time I am retiring from Law Enforcement
14 but I will not be drawing my retirement account. I do plan to continue
15 working in a different line of work. I thank you for the opportunity you have
16 given me to be employed as a Corrections Officer for the people of Kitsap
County. At this time I wish that my Resignation not be disseminated to my
fellow officers.

17 Id. Later, the Sheriff described Henneman’s demeanor during the meeting:

18 He was very clear in his plans for the future, was adamant that it was in his
19 best interests to move on and seek other employment opportunities, and out
20 of respect for my position, he wanted to present his decision to me personally.
21 He was calm, controlled, and presented rational and articulable reasons for
22 his resignation. I accepted his resignation, commended him for his years of
military and civilian service to the Sheriff’s Office and wished him well in
his future endeavors. . .

23 When Officer Henneman presented me with his letter of resignation, he
24 indicated that over the past several months he realized it was time for him to
25 retire, that the job was not like it was before and he was not happy continuing
26 to work in this profession. He was tired of the job, he was dissatisfied in what
27 he was doing, found himself being disenchanted and was in fact “disgruntled”
28 with his current circumstances. He was excited to look for new opportunities
outside law enforcement and shared his plans to begin training as a long haul
truck driver. It was obvious to me he was tired of his job, was ready to move
on and had specific plans for the future.

1 Aufderheide Declaration, Exhibit G.

2 The Sheriff accepted Henneman's resignation during the January 13 meeting. Aufderheide
3 Declaration, Exhibits C and G. Two days after the meeting, the president of the union, Ken
4 Watkins, sent an email to the Sheriff wanting to discuss Henneman's resignation, acknowledging
5 "I realize that you accepted his resignation . . .", but Henneman has changed his mind and wants
6 to discuss the extenuating circumstances behind his decision. Aufderheide Declaration, Exhibit
7 C.
8

9 On January 21, Henneman submitted a letter to Sheriff Simpson requesting rescission of
10 his retirement resignation: "[a]fter careful consideration and discussion with my family it is not
11 prudent for me at this time to retire." Aufderheide Declaration, Exhibit D.
12

13 The next day, a meeting was held between the Sheriff, Chief David White, union president
14 Ken Watkins, and Henneman regarding retraction of Henneman's retirement. After that meeting,
15 the Sheriff issued a letter to Henneman summarizing statements made by Henneman during the
16 January 22 meeting: Henneman had made a rash decision, one not discussed with family members
17 or others, and made during a period of being "disgruntled." Aufderheide Declaration, Exhibit E.
18 In the letter, the Sheriff confirmed Henneman's last day of employment on 01/27/2015, "until such
19 time Chief Newlin and I are able to review this recent dilemma . . ." reasoning that "[Chief Newlin]
20 is much closer to the circumstances of your work history and the agency's operations needs and
21 will be very much involved in the final outcome." Id. The letter closes by clarifying Henneman's
22 employment status:
23
24

25 At the end of your shift January 27, 2015, you are considered 'retired'.
26 Because of the current circumstances, your request for rescinding your notice
27 of resignation has essentially become a request for reinstatement. . .
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Id.

On January 27, Henneman submitted a letter to the Sheriff requesting reinstatement of his

1 employment “as a reasonable accommodation for my disability . . . I submitted my letter of
 2 resignation while I was suffering from an aggravation of depression and [PTSD], conditions Kitsap
 3 County was aware of and for which I had recently been on FMLA approved leave.” Aufderheide
 4 Declaration, Exhibit F.
 5

6 On February 5 Chief Newlin issued a letter denying Henneman’s request for reinstatement.
 7 Newlin Declaration, Exhibit C.
 8

9 III. AUTHORITIES AND ANALYSIS

10 A. Summary Judgment Standards.

11 Summary judgment is appropriate when, viewing the facts in the light most favorable to
 12 the nonmoving party, there is no genuine dispute as to any material fact that would preclude the
 13 entry of judgment as a matter of law. The party seeking summary dismissal of the case “bears the
 14 initial responsibility of informing the district court of the basis for its motion,” and identifying
 15 those records that show the absence of a genuine dispute as to any material fact. *Celotex Corp. v.*
 16 *Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Fed.R.Civ.P. 56(a)-(c). Once
 17 the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving
 18 party fails to designate “specific facts showing that there is a genuine issue for trial.” *Celotex*
 19 *Corp.*, 477 U.S. at 323-324, 106 S.Ct. 2548 (“One of the principal purposes of the summary
 20 judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think
 21 it should be interpreted in a way that allows it to accomplish this purpose”). “The mere existence
 22 of a scintilla of evidence in support of the non-moving party’s position is not sufficient,” and
 23 factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the
 24 consideration of a motion for summary judgment. *Arpin v. Santa Clara Valley Transp. Agency*,
 25 261 F.3d 912, 919 (9th Cir.2001); *quoting Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216,
 26
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1220 (9th Cir.1995); and citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In other words, “summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its favor.” *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d at 919; quoting *Triton Energy Corp. v. Square D Co.*, 68 F.3d at 1221.

B. Discrimination Framework.

As relevant to Henneman’s claims in this action, the American’s with Disabilities Act (ADA) provides:

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term “discriminate against a qualified individual on the basis of disability” includes--

... (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

42 U.S.C.A. § 12112.

The Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. §§ 621, et seq. makes it “unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.” 29 U.S.C. § 623.

The Washington Law Against Discrimination similarly prohibits age and disability

1 discrimination with regard to the right to obtain and hold employment. RCW 49.60.180; see RCW
 2 49.60.030. RCW 49.60.180 provides in relevant part:

3 It is an unfair practice for any employer:

4
 5 . . . (3) To discriminate against any person in compensation or in other terms
 6 or conditions of employment because of age, sex, marital status, sexual
 7 orientation, race, creed, color, national origin, honorably discharged veteran
 8 or military status, or the presence of any sensory, mental, or physical
 disability or the use of a trained dog guide or service animal by a person with
 a disability:

9 RCW 49.60.180(3).

10 Both the federal and state statutes address conditions of *employment*. These discrimination
 11 laws do not come into play after employment has ended. For the reasons explained in this brief,
 12 an employer does not violate discrimination laws for not reinstating an employee who quits of his
 13 own free will.
 14

15 C. Alternative Methods of Establishing Discrimination.

16 Henneman alleges disparate treatment discrimination – that Kitsap County terminated his
 17 employment because of his age and for having a disability. Henneman’s disparate treatment claims
 18 under the WLAD and ADA are addressed simultaneously because the methods of establishing a
 19 prima facie case under both laws are the same. A plaintiff can opt to present a prima facie case of
 20 discrimination using the *McDonald Douglas* burden shifting test,³ or, alternatively, provide direct
 21 or circumstantial evidence the defendant acted with a discriminatory motive and the discriminatory
 22 motivation was a significant or substantial factor in an employment decision. *McGinest v. GTE*
 23 *Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir.2004) (noting alternative means by which discriminatory
 24 intent can be shown); *citing Costa v. Desert Palace*, 299 F.3d 838, 852–53 (9th Cir.2002), *aff’d*
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³ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801, 93 S.Ct. 1817, 1823, 36 L.Ed.2d 668 (1973).

by 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003); *Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483, 490, 859 P.2d 26, 30 (1993), *amended*, 122 Wn.2d 483, 865 P.2d 507 (1994) (accepting and applying the alternative ways of establishing a prima facie case); *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); and *citing Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 364, 753 P.2d 517 (1988); and *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 136, 769 P.2d 298 (1989).

Whichever method Henneman proffers in response to the County's motion for summary judgment—the *McDonnell Douglas* burden shifting test or direct or circumstantial evidence of discrimination, no genuine issue of material fact exists from which a reasonable jury could conclude Henneman was discriminated or retaliated against because of age or disability.

D. Disparate Treatment Discrimination on Basis of Age and Disability.⁴

1. Age Discrimination.

To establish a prima facie case of disparate treatment age discrimination in employment, the employee must show: (1) he was within the statutorily protected age group of employees 40 years of age or older, (2) he was discharged, (3) he was doing satisfactory work; and (4) he was replaced by a younger person or discharged under circumstances otherwise giving rise to an inference of discrimination. *Merrick v. Hilton Worldwide, Inc.*, 867 F.3d 1139, 1146 (9th Cir. 2017); *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 189 Wn.2d 516, 532, 404 P.3d 464, 473 (2017); *citing Grimwood v. University of Puget Sound*, 110 Wn.2d 355, 361-364 (1988).

In *Kirby v. City of Tacoma*, 124 Wn.App. 454, 465, 98 P.3d 827, 833 (2004), a Washington court, relying on federal law, held that “[a]n actionable adverse employment action must involve a change in employment conditions that is more than an “inconvenience or alteration of job

⁴ Henneman does not allege age or disability harassment—he specifically alleges adverse action in the form of termination.

responsibilities . . . such as reducing an employee's workload and pay . . ." *Id. citing DeGuiseppe v. Village of Bellwood*, 68 F.3d 187, 192 (7th Cir.1995), *quoting Crady v. Liberty Nat'l Bank & Trust Co. of Indiana*, 993 F.2d 132 (7th Cir.1993); *and citing Ray v. Henderson*, 217 F.3d 1234, 1243–44 (9th Cir.2000).

Henneman was not discharged. As will be explained later in this brief, failing to accept rescission of a voluntary resignation is not an adverse action. Henneman does not allege in his Complaint how his age was the cause of his voluntary resignation, and does not allege facts of direct or circumstantial discrimination. Because he was not discharged, the County took no adverse action against him during his employment, and no facts evidence disparate treatment against him because of his age, Henneman's age discrimination claim should be dismissed.

2. Disability Discrimination.

The elements of a prima facie case of disparate treatment disability discrimination are that the employee: (1) was disabled, (2) was qualified; and (3) suffered an adverse employment action because of his disability. *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1087 (9th Cir. 2001); *McClarty v. Totem Electric*, 157 Wn.2d 214 (2006); *Brownfield v. City of Yakima*, 178 Wn.App. 850, 873 (2014).

Henneman suffered no adverse action during his employment. He voluntarily resigned. Henneman does not allege how a disability was the cause of his voluntary resignation.⁵ As with his age discrimination claim, because he voluntarily resigned and the County took no adverse action against him during his employment, and absent facts of direct or circumstantial discrimination based on a disability, Henneman's disability discrimination claim should be

⁵ This brief does not address the question whether Henneman had a disability at the time of his resignation, and by not raising it here, the County does not intend to waive it as a defense. The County believes he was not disabled within the meaning of the WLAD or ADA, but recognizing that while a genuine issue of fact on this element may exist, it is not raised at this time.

1 dismissed.

2 E. Henneman's Resignation was Voluntary.

3
4 Constructive discharge is not plead in the Complaint. However, it is relevant in
5 determining whether Henneman suffered an adverse action in employment. Under the law and the
6 facts of this case, the answer is he did not.

7 Courts have generally considered resignations voluntary, and once the resignation is
8 accepted, the employer has no duty to accept a rescission of the resignation. *Townsend v. Walla*
9 *Walla School District*, 147 Wn.App. 620, 627 (2008) (“[W]e presume a resignation is voluntary
10 and, thus, cannot give rise to a claim for constructive discharge”); *Molsness v. City of Walla Walla*,
11 84 Wn.App. 393, 398 (1996); *citing with approval Christie v. United States*, 207 Ct.Cl. 333, 518
12 F.2d 584, 587 (1975) (“This court has enunciated a principle, now firmly established, for
13 determining whether a resignation is voluntarily tendered. The element of voluntariness is vitiated
14 only when the resignation is submitted under duress brought on by [the employer’s action”).

15
16 An employee may rebut the presumption of voluntariness by showing the resignation was
17 prompted by duress caused by the employer or the employer’s oppressive actions. *Townsend v.*
18 *Walla Walla School District*, 147 Wn.App. at 627-628; *citing Molsness v. City of Walla Walla*, at
19 398. “But duress is not measured by an employee’s subjective evaluation of a situation, and an
20 undesirable work situation does not, in itself, obviate the voluntariness of a resignation.”
21 *Townsend v. Walla Walla School District*, at 628 (*citing Molsness and others*). Constructive
22 discharge involves “deliberate acts by the employer that create intolerable conditions, thus forcing
23 the employee to quit or resign.” *Townsend*, at 628.

24 To prove constructive discharge, an employee must show (1) the employer deliberately
25 made the employee’s working conditions intolerable, (2) a reasonable person would be forced to
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1 resign, (3) the employee resigned solely because of the intolerable conditions, and (4) the
 2 employee suffered damages. *Crownover v. State ex rel. Dep't of Transp.*, 165 Wn.App. 131, 149,
 3 265 P.3d 971, 980–81 (2011); *citing Campbell v. State*, 129 Wn.App. 10, 23, 118 P.3d 888 (2005).
 4 “An employee’s frustration, and even receipts of direct or indirect negative remarks, is not enough
 5 to show intolerable working conditions.” *Crownover v. State ex rel. Dep't of Transp.*, 165 Wn.App.
 6 at 149; *citing Washington v. Boeing Co.*, 105 Wn.App. 1, 10, 19 P.3d 1041 (2000). “A resignation
 7 will still be voluntary when an employee resigns because he or she is dissatisfied with the working
 8 conditions.” *Crownover, supra, citing Binkley v. City of Tacoma*, 114 Wn.2d 373, 388–89, 787
 9 P.2d 1366 (1990). *See also Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wn.App. 630,
 10 638, 700 P.2d 338, 343 (1985) (“A voluntary resignation occurs when an employee abandons the
 11 employment because of a desire to leave, including such a desire motivated by a dissatisfaction
 12 with working conditions. Even when circumstances exist that would justify a finding of discharge,
 13 an employee’s resignation may be voluntary if it was not prompted by the employer’s oppressive
 14 actions”); *citing 56 C.J.S. Master and Servant § 40(a)* (1948). A withdrawal of a resignation or an
 15 attempt to do so *may* vitiate the element of voluntariness if other evidence of constructive discharge
 16 exists. *See Micone v. Town of Steilacoom Civil Serv. Comm’n*, 44 Wn.App. 636, 642, 722 P.2d
 17 1369, 1373 (1986) (applying constructive discharge standards), *disapproved of on other grounds*
 18 *by Riccobono v. Pierce Cty.*, 92 Wn.App. 254, 966 P.2d 327 (1998).

19 The standard for constructive discharge is the same under federal law. *Pennsylvania State*
 20 *Police v. Suders*, 542 U.S. 129, 141, 124 S. Ct. 2342, 2351, 159 L. Ed. 2d 204 (2004) (Holding
 21 that the inquiry is objective: “Did working conditions become so intolerable that a reasonable
 22 person in the employee’s position would have felt compelled to resign?”); *citing 1 B. Lindemann*
 23 *& P. Grossman, Employment Discrimination Law* 838-839 (3d ed.1996) and C. Weirich et al.,

2002 Cumulative Supplement to Lindemann & Grossman 651-652, and n. 1 (collecting cases).

The Ninth Circuit has held that the intolerable conditions requirement is a high standard. *Brooks v. City of San Mateo*, 229 F.3d 917, 930 (9th Cir.2000) (“[C]onstructive discharge occurs when the working conditions deteriorate, as a result of discrimination, to the point that they become sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer.”). *See also Hardage v. CBS Broadcasting, Inc.*, 427 F.3d 1177, 1184 (9th Cir. 2005), *as amended by* 433 F.3d 672 and 436 F.3d 1050 (9th Cir. 2006), *cert. denied* 549 U.S. 812 (2006) (“[T]o survive summary judgment on a constructive discharge claim, a plaintiff ‘must show there are triable issues of fact as to whether a reasonable person in [his] position would have felt that [he] was forced to quit because of intolerable and discriminatory working conditions’”); *quoting Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir.1994); *and citing Pennsylvania State Police v. Suders*, 542 U.S. at 134; 124 S. Ct. at 2347. Further, plaintiff must demonstrate the intolerable and discriminatory conditions continue up to the point when he or she quits the job. *See Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465-66 (9th Cir.1994); *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406, 1412 (9th Cir. 1996) (To establish he was constructively discharged, a plaintiff must at least show some aggravating factors, such as a continuous pattern of discriminatory treatment); *Trinidad v. N.Y. City Dep’t of Corr.*, 423 F.Supp.2d 151, 168 (S.D.N.Y.2006) (noting that employee’s request for reinstatement established that working conditions were not intolerable).

Thus, any subjective belief that Henneman had no choice but to resign is irrelevant. There must be evidence Henneman was subjected to extraordinary, egregious, and intolerable discriminatory working conditions brought on by the County’s actions.

1 No intolerable conduct is alleged in the Complaint, and no competent evidence exists to
2 establish that a constructive discharge claim exists in this case. During his employment,
3 Henneman became “stressed-out” in performing the background investigator duties, and when the
4 County understood he did not want to perform them any longer they were removed. Of his own
5 volition he sought, and was approved for, FMLA leave after the incident on October 6, 2014 when,
6 at the recommendation of the on-duty mental health professional, he was let off for the day so he
7 could consult with his personal health provider. Indeed, Henneman’s health care provider certified
8 he had a serious health condition which qualified him for FMLA leave. He was absent from the
9 workplace on leave through January 2. He asked for and was granted light duty when he returned
10 to work as an accommodation. He worked without incident until January 13 when he voluntarily
11 submitted his resignation.
12

13
14 The following facts demonstrate Henneman’s resignation was indeed voluntary: (1) on
15 January 9, Henneman drafted a resignation letter at work and emailed it to his personnel address;
16 (2) the resignation submitted to the Sheriff was a prepared typed letter; (3) Henneman drafted his
17 resignation four days before he submitted it; (4) Henneman discussed his resignation with
18 coworkers before he submitted it to the Sheriff; (5) Henneman pre-arranged to meet with the
19 Sheriff at 4:00 p.m. on January 13 to personally deliver his resignation letter; (6) during
20 Henneman’s discussion with Chief Newlin and Lieutenant Elton approximately one and one-half
21 hours prior to his meeting with the Sheriff, Henneman was not “wavering or undecided in any
22 fashion . . . [he] was resolute”; (7) at the meeting with Newlin and Elton, Henneman said he was
23 to meet with the Sheriff at 4:00 p.m. “so that he had the ‘chance to thank the Sheriff for the
24 opportunities’ he has had while employed at the County”; (8) Henneman informed Newlin and
25 Elton that he did not intend to work in the law enforcement arena any longer; (9) at the conclusion
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1 of the meeting with Newlin and Elton, although Henneman became tearful, he spoke of his plan
2 to “find the tough guy” that he “had lost,” stating that somewhere in his career he had changed and
3 that the “tough guy” he once knew was lost and he wanted to regain that strength; (10) he told
4 Newlin and Elton that he had thought long and hard [about the decision to retire]; (11) he asked
5 that he be issued a retirement card; (12) during the meeting with the Sheriff on January 13,
6 Henneman said that over the past several months he realized it was time for him to retire, the job
7 was not like it was before, he was not happy continuing to work in this profession, he was tired of
8 the job, he was dissatisfied in what he was doing, found himself being disenchanted and was in
9 fact “disgruntled” with his current circumstances; and (13) he told the Sheriff that he was excited
10 to look for new opportunities outside of law enforcement and shared his plans to begin training as
11 a long haul truck driver.
12

13
14 At no time during the meetings on January 13 did Henneman mention a disability or
15 attribute his resignation to a disability. While he was no longer happy working as a corrections
16 officer, Henneman did not mention that the working conditions were intolerable, and the record
17 contains no evidence Henneman was burdened with intolerable, discriminatory working
18 conditions at the time he submitted his resignation. He was informed on October 6 (the day of the
19 “incident”) that the background investigator duties would be removed, and he did not perform
20 them again. When he returned to work, he was placed on light duty as he requested. There is no
21 evidence of objectionable incidents occurring before he submitted his resignation.
22

23
24 Two incidents occurred *after* Henneman submitted his letter of resignation, which
25 Henneman may point to as evidence of intolerable working conditions. On January 17, four days
26 after Henneman submitted his resignation letter, Lieutenant Penelope Sapp spoke with Henneman
27 regarding his assignment to swing shift. Another corrections officer had been released from light
28

1 duty assignment on the graveyard shift so Henneman could return to graveyard, which is the shift
2 he bid for. Henneman told Sapp that for family reasons, he wanted to remain on swing shift until
3 shift change. She informed him he would need to return to graveyard on January 23, because that
4 was the shift he bid, and he said he understood.

5
6 On January 19, three hours before his shift, Henneman called and asked to take the day off
7 using annual leave. The on-duty sergeant responded that the shift was closed at minimum staffing
8 and asked whether he wanted to take sick leave. Henneman responded that he only had one day
9 of sick leave and preferred not to use it. He then started to cry, he said he was having a really hard
10 time and wanted to get the night off. He asked to speak with peer support, and as the sergeant was
11 a designated peer support they spoke for a while, and Henneman calmed down. The sergeant
12 informed Sapp about Henneman's request for sick leave, who called and told Henneman that the
13 only way he could get off work was to use sick leave. Henneman said he did not want to use sick
14 leave because he did not want to stay home alone. His wife and son were at his mother-in-law's
15 and he wanted to be with his family because they were his only support. Sapp said he could spend
16 the time at his mother-in-law's while on paid sick leave.

17
18 His transfer to the graveyard shift—which he bid for, and requiring him to use sick leave
19 rather than annual leave, occurred after he submitted his resignation, so they should be irrelevant
20 to rebut the presumption his resignation was voluntary. Moreover, these two incidents do not rise
21 to the level of egregious conduct necessary to establish constructive discharge.

22
23 Because Henneman is unable to show he was constructively discharged, he cannot meet
24 his burden of establishing an adverse employment action, and his age and disability disparate
25 treatment claims should be dismissed.

26
27 F. Henneman's Voluntary Quit Obviated the Obligation to Engage in the Interactive
28 Process or Accommodate a Disability.

1
2 Henneman claims Kitsap County took adverse action against him when it failed to
3 accommodate his disability by failing to engage in the interactive process with him and terminating
4 him for having a disability. Complaint, Dkt. 1-3, pp. 4-5, §§3.14-3.19. As with his disparate
5 treatment claims, Henneman's failure to accommodate claims under the WLAD and ADA are
6 addressed simultaneously because the methods of establishing a prima facie case under both laws
7 are the same.
8

9 Under the ADA and WLAD, the duty of an employer to reasonably accommodate an
10 employee's disability does not arise until the employee gives the employer notice of his disability.
11 *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112 (9th Cir.2000) (en banc), *vacated on other grounds*,
12 *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002); *Ferguson v.*
13 *Wal-Mart Stores, Inc.*, 114 F.Supp. 2d 1057, 1068–69 (E.D. Wash. 2000); *citing Goodman v.*
14 *Boeing Co.*, 127 Wn.2d 401, 408–09 (1995); *and Smith v. Midland Brake, Inc.*, 180 F.3d 1154,
15 1171–72 (10th Cir.1999) (the reasonable accommodation requirement ordinarily begins with “the
16 employee providing notice to the employer of the employee's disability and any resulting
17 limitations”). “This notice then triggers the employer's burden to take ‘positive steps’ to
18 accommodate the employee's limitations.” *Ferguson v. Wal-Mart Stores, Inc.*, 114 F.Supp. 2d at
19 1068-1069; *quoting Goodman v. Boeing*, 127 Wn.2d at 408; *see also Smith*, 180 F.3d at 1172
20 (noting that the employer's responsibilities are triggered by appropriate notice by the employee).
21
22

23 Nothing about Henneman's behavior after he returned to work on January 2 or when he
24 resigned his employment on January 13 would give rise to a notice of the need to engage in the
25 interactive process. Before he quit, the County granted all of Henneman's requests for
26 accommodation: removing his background investigator duties at his request, granting his FMLA
27 request, granting his request to extend his leave beyond December 29 when his FMLA allotment
28

1 expired, and granting his request for light duty in the control room.

2 Henneman apparently claims, or is likely to claim, his disability caused him to resign.
3 Courts have held that “[c]onduct resulting from the disability . . . is part of the disability and not a
4 separate basis for termination.” *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138 (2004) (en banc),
5 *abrogated on other grounds by Mikkelsen v. Public Utility District No. 1 of Kittitas County*, 189
6 Wn.2d 516 (2017); *citing Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128, 1139–40
7 (9th Cir.2001); *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1093 (9th Cir. 2007); *citing*
8 *Riehl v. Foodmaker, Inc.*, *supra*. “[W]here an employee demonstrates a causal link between the
9 disability-produced conduct and the termination, a jury must be instructed that it may find that the
10 disability-produced conduct and the termination, a jury must be instructed that it may find that the
11 employee was terminated on the impermissible basis of her disability.” *Gambini v. Total Renal*
12 *Care, Inc.*, 486 F.3d at 1093.

14 Whether an employer’s refusal to reinstate an employee who claims his disability caused
15 him to resign violates disabilities laws was addressed in *Wooten v. Acme Steel Co.*, 986 F. Supp.
16 524, 525–26 (N.D. Ill. 1997). The specific issue there was the same as presented by Henneman:
17 “[D]oes an employer’s refusal to reinstate an employee who quit during an alleged episode of
18 depression violate the ADA?” The plaintiff in *Wooten* claimed his employer’s conduct in denying
19 him reinstatement constituted two types of discrimination: (1) failure to reasonably accommodate
20 plaintiff’s disabling depression, and (2) disparate treatment. *Wooten v. Acme Steel Co.*, 986 F.
21 Supp. at 526 (“Specifically, Wooten’s reasonable accommodation claim alleges that he is entitled
22 to reinstatement as a reasonable accommodation for his depression, and that Acme’s refusal to do
23 so discriminated against him because of his disability”).

26 The court in *Wooten* reasoned that the ADA speaks only in terms of working conditions
27 and adjustments to them during employment; it says nothing about having to accommodate the
28

1 employee with a change in the employment relationship itself. The ADA defines “reasonable
2 accommodation” as follows:

- 3 (A) making existing facilities used by employees readily accessible to and
4 usable by individuals with disabilities; and
5 (B) job restructuring, part-time or modified work schedules, reassignment to
6 a vacant position, acquisition or modification of equipment or devices,
7 appropriate adjustment or modifications of examinations, training materials
8 or policies, the provision of qualified readers or interpreters, and other similar
9 accommodations for individuals with disabilities.

10 42 U.S.C. § 12111(9).

11 Thus, held the *Wooten* court, the statute does not contemplate reinstatement after quitting
12 as a reasonable accommodation. *Id.* at 528-529; citing *Siefken v. Village of Arlington Heights*, 65
13 F.3d 664, 666–67 (7th Cir.1995) (Rejecting police officer’s request for “[a] second chance” as an
14 accommodation after being fired for neglecting to monitor his diabetes and driving his squad car
15 erratically when he experienced the resulting diabetic reaction—such a request was not for an
16 accommodation as envisioned in the ADA, “[t]he employer must be willing to consider making
17 changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled
18 individual to work”); and citing *Stauffer v. Bayer Corp.*, 1997 WL 588890, at *4, *11 (N.D.Ind.
19 July 21, 1997) (An employee who resigned right after receiving a bad review and during a period
20 when her adjustment disorder rendered her “out of [her] mind” was not entitled to reinstatement
21 as a reasonable accommodation, because asking for her job back was not an “accommodation,”
22 but rather a request for a “second chance” at her job, something the ADA does not require an
23 employer to provide).

24 For the *Wooten* court, it did not matter that the departures of the employees in both the
25 *Stauffer* and *Siefken* cases were due in part by factors other than their disabilities—in *Stauffer*, the
26 bad review, and in *Siefken*, the failure to control a “controllable disability”—whereas *Wooten*’s
27
28

1 job performance was never in question and his resignation was driven solely by his uncontrollable
2 depression. “But that does not alter the fundamental principle driving these decisions: that the
3 ADA’s reasonable accommodation provisions refer to changes in ‘ordinary work rules, facilities,
4 terms, and working conditions,’ not altering the employment relationship itself.” *Wooten* at 529.

5
6 The *Wooten* court also reasoned: “[t]he only accommodation that the complaint can fairly
7 be read to request consistent with Wooten’s allegations about his uncontrollable depression is
8 reinstating him whenever he resigns during a depressive episode. We cannot conclude that the
9 ADA requires such extreme measures.” *Id.*

10
11 The *Wooten* court also rejected the plaintiff’s argument that the employer failed to engage
12 in the interactive process, because the plaintiff never requested a reasonable accommodation in his
13 employment conditions, either before or after his termination. *Id.* at 531. Here, the County
14 granted all of Henneman’s requests made before he submitted his resignation—removal from the
15 background investigator position, FMLA leave, extension of leave when his FMLA allotment was
16 exhausted, and light duty upon his return to work.

17
18 Another case with facts similar to those presented here is *Featherstone v. S. California*
19 *Permanente Med. Grp.*, 10 Cal.App. 5th 1150, 1154–55, 217 Cal. Rptr. 3d 258, 263 (Ct. App.
20 2017), *review denied* (July 12, 2017). In that case the employee alleged a temporary disability
21 caused by a medication reaction which “altered [her] mental state.” While in the altered mental
22 state, the employee resigned—first, orally in a telephone conversation with her supervisor and
23 then, a few days later, she confirmed her resignation in writing in an email to her supervisor. A
24 few days after confirming her resignation in writing, the employee requested the employer allow
25 her to rescind her resignation. After considering the employee’s request, the employer declined to
26 do so. The employee then sued, alleging her employer acted with discriminatory animus by
27
28

1 refusing to allow her to rescind her resignation. *Featherstone*, 10 Cal.App. 5th at 1154-1155.

2 In *Featherstone*, the California Court of Appeals upheld summary judgment dismissal of
3 her claim because absent evidence of constructive discharge or contractual obligation, refusal to
4 allow rescission is not an adverse employment action under California employment discrimination
5 laws. *Featherstone*, 10 Cal. App. 5th at 1161-1162 (“an adverse employment action is one that
6 affects an employee, not a former employee, in the terms, conditions or privileges of his or her
7 employment, not in the terms, conditions or privileges of his or her unemployment”).

8
9 Numerous other cases have concluded that accepting an employee’s voluntary resignation,
10 and failure to accept rescission of a resignation, are not adverse actions. *Curby v. Solutia, Inc.* 351
11 F.3d 868, 872 (8th Cir. 2003) (“Because she resigned, Curby also cannot show she suffered an
12 adverse employment action. An employee cannot submit a resignation and then claim the
13 employer’s acceptance of the resignation is an adverse employment action”); citing *Hammon v.*
14 *DHL Airways, Inc.*, 165 F.3d 441, 447 (6th Cir. 1999) (“When an employee voluntarily resigns, he
15 cannot claim that he suffered an adverse employment decision under the ADA or the FMLA”);
16 citing *Keever v. City of Middletown*, 145 F.3d 809, 813 (6th Cir.1998) (affirming lower court’s
17 decision that an employee who voluntarily resigned did not suffer an adverse employment decision
18 under the ADA); *MacLean v. City of St. Petersburg*, 194 F.Supp.2d 1290, 1299 (M.D.Fla. 2002)
19 (unless “the employer forces the [employee’s] resignation by coercion or duress” or “obtains the
20 resignation by deceiving or misrepresenting a material fact,” an employee’s resignation is
21 “presumed to be voluntary,” and, therefore, the employer’s “failure to accept [the employee’s]
22 rescission of her voluntary resignation [is] not an adverse employment action”).

23
24 The above cases demonstrate Kitsap County that was not legally required to engage in the
25 interactive process with Henneman because it was not required to reinstate his employment as an
26
27
28

1 accommodation of a disability and failure to reinstate him was not an adverse action. So, his
 2 claims of disparate treatment discrimination, failure to engage in the interactive process, and
 3 failure to accommodate should all fail.
 4

5 G. No Adverse Action So No Retaliation Under the WLAD.

6 Henneman also claims retaliation under the WLAD for having a disability, for requesting
 7 a reasonable accommodation, and because of his age.

8 “The WLAD prohibits retaliation against a party asserting a claim based on a perceived
 9 violation of his civil rights or participating in an investigation into alleged workplace
 10 discrimination.” *Alonso v. Qwest Communications Co., LLC*, 178 Wn.App. 734, 753–54, 315 P.3d
 11 610, 620 (2013); *citing* RCW 49.60.210. To establish a prima facie retaliation case, a plaintiff
 12 must show: (1) he engaged in statutorily protected activity, (2) his employer took an adverse
 13 employment action against him; and (3) there is a causal link between the activity and the adverse
 14 action. *Alonso v. Qwest Communications Co., LLC*, 178 Wn.App. at 753-745, *citing* *Short v. Battle*
 15 *Ground Sch. Dist.*, 169 Wn.App. 188, 205, 279 P.3d 902 (2012).
 16
 17

18 The only statutorily protected activity Henneman engaged in are requesting and taking
 19 FMLA leave, requesting his leave be extended to January 2 after his FMLA allotment expired, and
 20 requesting a light duty assignment for 30 days. As his requests were granted, he can point to no
 21 adverse action before he submitted his resignation. And for the reasons explained previously
 22 concerning constructive discharge, where intolerable working conditions are absent, failure to
 23 accept an employee’s request for reinstatement following a resignation is not an adverse
 24 employment action. His retaliation claims should also be summarily dismissed.
 25
 26

27 IV. CONCLUSION

28 Kitsap County took Henneman at his word when he resigned: it was time for him to retire,

1 the job was not like it was before, he was not happy continuing to work in this profession, he was
2 tired of the job, he was dissatisfied in what he was doing, he found himself being disenchanted and
3 was in fact “disgruntled” with his current circumstances, and he was excited to look for new
4 opportunities outside of law enforcement. No genuine issue of material fact exists showing that
5 Henneman was not discriminated or retaliated against because of his age or disability, no
6 intolerable working conditions forced him to resign, and the County was not obligated to accept
7 rescission of his resignation as an accommodation of a disability. And, given the fact that
8 Henneman was distressed and dissatisfied enough to resign once, he could easily do it again. All
9 of his claims should be dismissed.
10
11

12 Respectfully submitted this 5th day of April, 2018.

13 TINA R. ROBINSON
14 Kitsap County Prosecuting Attorney

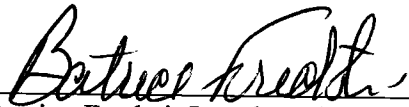
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16 /s/ Jacquelyn M. Aufderheide
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CERTIFICATE OF SERVICE

I certify that on April 5, 2018, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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